



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 595 OF 2015

BEATRICE MUTHONI KIRAITU PLAINTIFF

VERSUS

RICHARD MUHERIA KURIA DEFENDANT

R U L I N G

1. In its short life, this matter has taken on a convoluted history. The Plaintiff instituted a suit by filing a Complaint on 2nd December 2015. The Summons to Enter Appearance were issued on 15th December 2015. The Defendant entered Appearance on 11th January 2016 and on the same day filed a Defence. On 1st February 2016, the Plaintiff filed a Reply to the Defence. In it she said that the Plaintiff shall file an application seeking an order that the said Statement of Defence be struck out and for summary judgment be entered against the Defendant.

2. The aforesaid application was filed on the same day. The Supporting Affidavit was sworn by the Plaintiff and the Exhibits are voluminous. That Application was listed for Hearing on 25th February 2016. There is a return of service filed on 22nd February 2016 deponing that the Application was served on the same day, that is, 1st February 2016. Notwithstanding that the date had been given in the Registry, the hearing was not incorporated into the cause list. Counsel for the Defendant informed the Court that he had received a Hearing Notice signed by S. Ogot. She was the Hon Deputy Registrar of the Division at the time. Nevertheless the Defendant had not responded and was asking for more time. Counsel for the Defendant submitted that 7 days were sufficient. The Plaintiff conceded time for a response and asked for the matter to be heard sooner rather than later including by oral submission. The Court Ordered that:

1. The Respondent is granted leave to file and serve a Replying Affidavit within 7 days of today.
2. List for Hearing of the Notice of Motion dated 28th January 2016 on 14th March 2016 by agreement
3. Costs in the Cause.

3. On 14th March 2016, the Application was once again not listed. The Court gave the Parties a Mention on 16th March 2016 to take a Hearing date, to ameliorate the omission by the Registry. On 16th March 2016, it became apparent that the Defendant still had not filed a Replying Affidavit. Counsel who appeared on that day was asking for two more days. She said she had limited instructions. Counsel for the Plaintiff once again conceded to allowing a further 2 days. That would have been on 19th March

2016. The Plaintiff had already filed its List of Authorities. The Court made another Order for hearing as follows:

1. The Respondent shall have an additional 2 days to file and serve a Replying Affidavit.
2. In the event that the Respondent does not file a Replying Affidavit [as ordered] he shall be deemed to not wish to do so.
3. List for Further Hearing on 15th April 2016
4. Defendant to pay the costs of today.

4. The Plaintiff's Application then came before the Court for Hearing on 15th April 2016. Notwithstanding, what was said relating to oral submissions being sufficient, Mr Kihara, Counsel for the Defendant "wondered whether there was an order for written submissions". In the event there was not. Following a further concession by the Plaintiff the Court made the following Order:

1. Parties are ordered to file and serve their written submissions within 14 days
2. List for Mention to ensure compliance and to take a date for Highlighting/Ruling . Listing on 5th May 2016.
3. Costs in the Application.

The Registry did not list the Application on 5th May but 4th May 2016 instead. By that stage the Defendant had neither filed a replying affidavit nor written submissions. Counsel for the Plaintiff attended. Counsel for the Defendant did not. When he was contacted, he asked the Court to re-list the matter on 12th May 2016. Once again the Plaintiff conceded and the Court relisted the matter for Highlighting on 12th May 2016.

5. The Court record shows that on 11th May 2016, the Defendant filed "A Further Replying Affidavit" and "Defendant/Respondent's Submissions. Also filed were two Affidavits from family members. On 12th May 2016 when the Matter came before the Court for Hearing (for the third time) . Counsel for the Defence was not there. Counsel holding brief informed the Court that Counsel for the Defendant had filed his submissions and was ready to proceed. Counsel for the Plaintiff raised the "Preliminary Issue on whether the submissions are properly filed". The Plaintiff's Counsel took issue because his Submissions had been filed in compliance with the Order made in April 2016. He said that the Further Replying Affidavit now filed is clearly in response to the Plaintiff's Submissions and if it is allowed at this late stage, it would prejudice the Plaintiff's Application. The Defendant's response was to make an oral application for the new evidence to be allowed on the record at that stage.

6. The Court made the following Order:

1. The Oral Application for acceptance of new evidence is adjourned
2. Counsel with conduct on behalf of the Defendant shall within 14 days file and affidavit explaining why, if the evidence is pertinent, it was not produced earlier in compliance with court orders.
3. The Defendant to pay the Plaintiff's cost of today on an indemnity basis.
4. Parties to take a date at the Registry for Hearing of the Defendant's Application.
5. List for Mention on the Plaintiff's application on 8th August 2016.

7. The Parties did not take a date for hearing of the Defendant's Application. The Mention on the Plaintiff's Application was not listed. The following day, 9th August 2016, the Defendant filed a further Application under Certificate of Urgency. The Application was also accompanied by Chambers Summons asking that the Matter be deemed to be appropriate for vacation business. The Duty Judge gave Directions and the matter was listed for an inter partes hearing before this Court on 29th August 2016.

8. That Application is brought under ***Order 51 Rule 1, Order 50 Rule 6, Order 8 Rules 5 and 7 of the Civil Procedure Rules and Sections 1A, 1B, 3, 3A and 100 of the Civil Procedure Act, and any other enabling provisions of the law..*** It seeks the following Orders:

1. THAT this application be certified as urgent. (spent)
2. THAT this Honourable Court be pleased to extend time within which the Defendant should file his further affidavits and Submissions to the Notice of Motion dated 25th February 2016.
3. THAT in the ALTERNATIVE and WITHOUT PREJUDICE the Defendants Further Affidavits and Submissions filed and served on 11th May 2016 be deemed to have been duly filed and served within time.
4. THAT the Defendant/Applicant herein be granted leave to amend his statement of Defence in the terms proposed in the Amended Defence annexed hereto.
5. THAT the Amended Defence annexed hereto be deemed to be duly filed and served upon the Plaintiff upon payment of the requisite court fees.
6. THAT the costs of this Application be provided for.

The Application is based on the Grounds that appear on its face and the "annexed Affidavits of Richard Muheria Kuria, the Defendant. The first ground states that the matter was due to be heard on 8th August 2016. That statement is factually incorrect. In fact the Plaintiff's Application was due to be heard on 12th May 2016. The Defendant made an oral application and the hearing was adjourned. The Matter was simply to be mentioned on 8th August but was not listed. Ground (b) and Paragraph 3 of the Supporting Affidavit state "*That the Honourable Court directed the respondent to file this instant Application and proceeded to issue a hearing date for the Plaintiff's Application dated 25th February 2016.*". Again that statement is factually incorrect and does not accord with the Orders made by the Court as set out above. Ground (c) and paragraph 4 are identical and say "That the delay in filing the aforementioned pleadings and documents was occasioned by unforeseen hitches faced by the Applicant herein in obtaining the information detailed in the pleadings from the police and Kenya Commercial Bank, which delay is neither intentional nor inordinate.

9. It should be borne in mind that the Defendant had filed a Defence. That Defence contained bare denials. The Defence denied the existence of any loan whatsoever put the Plaintiff to proof. In the circumstances, it is unclear what documents would be necessary for the Defendant to substantiate that Defence. The Loans were said to have been made 3 years previously. From the Further Replying Affidavit and the Application to amend the Defence, it seems the Defendant intends to completely resile from that Defence. Mr Ndumberi for the Plaintiff argues that the Defendant's current position is in response to the Plaintiff's affidavit and is intended to deny her an opportunity to have a timely and fair hearing.

10. The Application is opposed by the Plaintiff in her Replying Affidavit filed on 26th August 2016. In the Affidavit the Plaintiff states that the Defendant's Application is intended to deny her justice, hinder the just determination of the dispute between the parties and is an abuse of the court process. The Plaintiff also says that the Defendant's latest application to amend his Defence is ill-intentioned and is intended to convolute the real question or issue between the Parties. The Plaintiff also states that the intended

amendment is an afterthought and that is demonstrated by the Statement, “subsequent to filing my defence herein, I have formed the view upon advice of my advocates on record, this it is necessary that my statement of Defence be amended in order to plead further grounds of Defence”. However, the Application states, the Defence contains triable issues, why then is it necessary for the Defendant to have a second bite at the cherry after the Plaintiff filed her application for strike out? No explanation is provided. The Plaintiff’s submissions, go to the merits of the Defence however, that is not appropriate at this stage. However, the Plaintiff does argue that the Defendant is attempting to change his case. In that respect she relies on the authority of **Mwea Rice Growers Co-operative Society Ltd vs Alred Nderity in HCC 29 of 2003 (Embu)** where Hon Lenaola J said that an amendment to introduce a new cause of action to a suite would be refused. The Plaintiff argues that the argument should extend to an amendment that is intended to create an inconsistency in pleadings so that in fact the real issues are emasculated. The Plaintiff also argues that the Defendant’s conduct in these proceedings has been characterised by a failure to comply with court orders and directions on several occasions. The Record bears that out. The Plaintiff argues that breach is willful and in total disregard for the law and court directions. Mulla’s Code of Civil Procedure 2002 Edition lists bad faith or dilatory motive on the part of an applicant, as a ground for refusing to grant leave to amend. The Plaintiff also argues that the intended amended defence is an abuse of the Court’s process.

11. The Plaintiff also relies on the principle enunciated by Hon F Gikonyo in **John Mulwa Kang’aatu v Pan African Insurance Company Ltd 2015 eKLR** that;

“Amendment of pleadings should only be allowed if the said amendments are necessary for determining the real question or controversy between the parties. The said amendments should also not be used to temporise or delay a case or introduce a new cause of action.”

12. The Defendant’s own authority supports that proposition. It states;

“It will be sufficient for the purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs... The court will not refuse leave to allow an amendment simply because it introduces a new case (**Eastern Bakery vs Castelino [1958] EA 46**). That authority does not lend any assistance where an application to amend is made after the Hearing was due but delayed due to the non-compliance of the party making the application.

The Defendant brings the Application under ***Order 50, rule 6*** that provides;

“6. *Where a limited time has been fixed for doing an act or taking any proceedings under these Rules, or summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require. And such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed”*. In relation to filing a response to the Plaintiff’s Application for summary judgment, the Court exercised that power on at least two earlier occasions. The Defendant must demonstrate why its failure to comply must be excused, yet again. The Plaintiff has not argued *res judicata*.

13. The Defendant must have been aware at least by January 2016 of the need to file the documents on which he seeks to rely. He filed a Defence. Order 7 Rule 5 of the Civil Procedure Rules provides:

5. *The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—*

- (a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;*
- (b) a list of witnesses to be called at the trial;*
- (c) written statements signed by the witnesses except expert witnesses; and*

(d) copies of documents to be relied on at the trial.

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.

15. Therefore, the Application being made now must have been in the Defendant's contemplation when the Defence was filed in January 2016, yet nothing was said to the Plaintiff or the Court. The Defendant has by contrast filed (late) Written Submissions contesting the Application for a strike out on the basis that the Defence (as filed and served) demonstrates an arguable case that merits trial. Why then should the Court at this stage allow large scale amendment of the Defence. The amendments suggested in the draft do not elaborate or clarify the pleaded case, they set up an entirely new defence.

16. The timing of the Application also raises concern. The Plaintiff has tried time and again to have her Application for Summary Judgment heard. On each occasion she was thwarted by the Defendant not being ready. The Defendant failed to use every one of the chances he was given to comply with Court Orders. However, he now pleads for the same Court to exercise its discretion in his favour.

17. In addition to the principles set out in the Parties' respective cases the Court is also guided by the principles that (a) parties are entitled to be heard in an efficient and timely manner, (b) that the litigants and their lawyers also have a duty to ensure timely and efficient hearing of disputes. "Section 1A:

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A Party to civil proceedings or an advocate for such a Party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

Section 1B:

1. For the purpose of furthering the overriding objective specified in section 11A the Court shall handle all matters presented before it for the purpose of attaining the following aims –

a. The just determination of the proceedings,

b. The efficient disposal of the business of the Court,

c. The efficient use of the available judicial and administrative resources;

d. The timely disposal of the proceedings, and all other proceedings, in the Court, at a cost affordable by the respective parties; and

*e. The use of suitable technology". Per Muchelule J in **Sultan Hardware Ltd v William Murithi Kimani and Charles Adongo Civil Appeal No 150 of 2012, High Court of Kenya at Kisumu***

18. Repeated failure to comply with court orders cannot be consistent with that duty. The Defendant has not provided the Court with any plausible reason why he has not complied with the Orders of the Court – even when the opportunity for explanation has been availed. The Defendant has taken conflicting positions and that prejudices the Plaintiff as she cannot ascertain the case she has to meet – because it keeps changing. That is contrary to Article 50 and to the principles of natural justice.

19. The Parties have filed Written Submissions, the Defendant on 16th September 2016 and the Plaintiff

on 11th October 2016. The Court has considered then and taken them into account in coming to its decision.

20. In the circumstances, this Court finds that the content and timing of the application is designed to delay the hearing of the Plaintiff's application. Given the Defendant's earlier failure to comply, the Defendant is not deserving of the Court's discretion being exercised in its favour. In relation to the application to amend, that should have been filed timeously at the time of the Replying Affidavit. The Defendant has already had three changes to do so. He chose not to. In the circumstances, this application and its content can only be an abuse of the court process. Save for the Written Submissions that were filed on 11th May 2016, which are deemed to be duly filed. The Defendant's Application is therefore dismissed with costs.

Order accordingly

FARAH S. M. AMIN

JUDGE

DATED 9TH JUNE 2017

SIGNED AND DELIVED at NAIROBI this 15th day of June 2017.

In the Presence of

Clerk: Patrick Mwangi

Plaintiff: Mr Ndumberi

Defendant : Miss Njuguna Holding Brief for Mr Kihara